

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE: VALSARTAN, LOSARTAN, AND

CIVIL ACTION NUMBER:

IRBESARTAN PRODUCTS LIABILITY

1:19-md-02875-RBK

LITIGATION

MOTION HEARING

Via Zoom Videoconferencing

Mitchell H. Cohen Building & U.S. Courthouse
4th and Cooper Streets
Camden, New Jersey 08101
January 7, 2022
Commencing at 2:01 p.m.

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Proceedings recorded by mechanical stenography; transcript
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1 ...**P R O C E E D I N G S**, held via remote Zoom
2 videoconferencing before the Honorable Thomas I. Vanaskie,
3 (Ret.), Special Master, at 2:01 p.m. as follows:

4 JUDGE VANASKIE: All right. Do we have everybody
5 here that needs to be here for this?

6 MS. WHITELEY: We do for my side, Your Honor,
7 plaintiff.

8 MS. BRANCATO: We do for defendants as well, Your
9 Honor.

10 JUDGE VANASKIE: All right. Mr. Waldin, will you be
11 addressing this matter on behalf of Humana?

12 MR. WALDIN: Yes, I will. Thank you, Your Honor.

13 JUDGE VANASKIE: Okay. All right.

14 Well, thank you all very much. I wanted to hear
15 argument. This should be a very straightforward matter, you
16 would think, but I don't think anything is straightforward in
17 this MDL. And so I had some questions.

18 I thought I could knock this out relatively quickly,
19 and I realize that I had a few questions for counsel that would
20 help me make the final decision. And that's why we scheduled
21 it. I appreciate you all being willing to adjust your
22 schedules to get this argument concluded as promptly as
23 possible.

24 And so let me say, when I look at this, my
25 understanding was that Humana had filed this action in light of

1 the unwillingness of certain parties who are named as
2 defendants in the Humana action, their unwillingness to agree
3 to toll the statute of limitations pending a decision on the
4 class certification motion for the Economic Loss Master
5 Complaint.

6 My understanding -- and you all can correct me if my
7 understanding is incorrect -- is that Humana would be part of
8 the class, the proposed class in the Economic Loss Master
9 Complaint in this matter.

10 Humana Pharmacy, Incorporated, which I take it is
11 either an affiliate or a subsidiary of Humana, was also named
12 as a defendant in the original Economic Loss Master Complaint.
13 But as I worked on the proposed motions for leave to amend the
14 Economic Loss Master Complaint, ELMC, it appeared to me that
15 Humana Pharmacy would not be a defendant; and when the proposed
16 ELMC was filed, I saw that Humana is not named as a defendant
17 in that proposed ELMC.

18 Now, that's a long introduction to get to the
19 question of: Why isn't it just appropriate for Humana in this
20 matter to follow the American Pipe rule of tolling claims when
21 you are a part of a plaintiff class? Why do we need to have a
22 separate action at this time?

23 MR. WALDIN: Yeah. Let me address that, Your Honor.

24 We don't have an opposition to that. And we've asked
25 defendants to stipulate that American Pipe would preserve the

1 timeliness of our complaint.

2 Defendants have thus far been unwilling to stipulate
3 to that. Because the class definition was amended after the
4 filing of the complaints, we're concerned that the defendants
5 may, at a later point in time, assert that Humana's claims are
6 not timely because the amendment came after the limitations
7 period for certain complaints.

8 And so without some assurance from defendants or
9 without an order from the Court saying that the claims would be
10 timely, we're concerned about that, and we're not currently
11 willing to dismiss without some sort of further assurances that
12 we won't face that argument in the future.

13 JUDGE VANASKIE: All right. Ms. Brancato, did you
14 want to be heard on that issue?

15 MS. BRANCATO: Yes. Thank you, Your Honor.

16 We did talk with Humana's counsel about a potential
17 tolling agreement. And Mr. Waldin is right, that defendants
18 didn't agree to a tolling agreement, and we don't think it's
19 appropriate for defendants to be issuing some kind of statement
20 as to who was a member of the class or who wasn't, which is
21 effectively what we would be doing by signing on to a tolling
22 agreement.

23 But the bottom line is: If we can't sign on to it,
24 if we can't agree to a tolling agreement and Humana feels like
25 it needs to file this case, which it did, and it seems like

1 Mr. Waldin is saying he wants to keep its case, then the case
2 should move forward as an opt-out and proceed through discovery
3 as any normal case would.

4 JUDGE VANASKIE: Well, this is far from any normal
5 case, I think.

6 Ordinarily, the courts say that factors have to be
7 weighed if there is the possibility of harm to the defendant --
8 in this case the defendants -- if a stay of the litigation is
9 not granted.

10 So I'd ask Mr. Waldin: What is the harm to the
11 defendants if I grant a stay?

12 MR. WALDIN: I can think of none, Your Honor.

13 The defendants waited until we had filed our motion
14 to stay to seek any discovery from Humana. And the discovery
15 that they sought upon the filing of our motion was not directed
16 at any issues that were, in our view, currently ripe for
17 discovery under the Court's existing discovery orders that deal
18 entirely with class certification-related discovery.

19 To the extent that there will be further opt-outs,
20 which seems to me to be likely, or at least probable in this
21 case, discovery of those cases would not happen until after the
22 class certification order comes down. And it seems appropriate
23 to us that our discovery take place in parallel with the
24 discovery in those cases because they will be substantially
25 similarly situated at that time.

1 MS. WHITELEY: Your Honor --

2 JUDGE VANASKIE: Mr. Waldin, I will -- I'm sorry.

3 Ms. Whiteley, did you want to be heard?

4 MS. WHITELEY: Yes, Your Honor. This is Conlee
5 Whiteley on behalf of the plaintiffs.

6 Were Humana to be filing this action and actively
7 seeking to litigate, the co-leads would come to the Court and
8 ask that this case be stayed because we believe that it would
9 be outside of the scheduling order and it would be something
10 that should be litigated separately if and when there is no
11 class granted.

12 And then I also would like to add that I believe that
13 until we have confirmation and a final amended complaint,
14 Humana is still left in a bit of a lurch in terms of
15 determining exactly where they fit in, because the ambiguities
16 that caused them to file to begin with remain until this
17 complaint, which the defendants have objected to, is no longer
18 proposed but actually the operative complaint.

19 JUDGE VANASKIE: Well, the interests of other parties
20 are certainly pertinent in terms of determining whether or not
21 a stay is appropriate.

22 Ms. Brancato, how are the defendants in the Humana
23 case prejudiced by a stay of the litigation?

24 MS. BRANCATO: Your Honor, the defendants won't agree
25 to a tolling agreement in part because they want any litigation

1 against them to proceed now at the same time as the other
2 litigation. The other cases are moving forward.

3 Defendants have already produced, I think it's fair
4 to say, probably millions of documents at this point and put up
5 millions of witnesses, and other plaintiffs have produced
6 documents as well.

7 Humana should receive -- we should agree to a
8 schedule for the Humana case and start discovery and get
9 discovery from Humana at this point so that this case can move
10 forward.

11 Our goal here is just to make these cases -- make
12 this process more efficient. And waiting until potential
13 opt-outs file their additional cases at some point down the
14 line doesn't make things more efficient. It makes things far
15 less efficient. And, you know, there may be other opt-outs.
16 But in every case I've ever been involved in, what happens is
17 if someone files a complaint, you proceed on that complaint.
18 And then if there are other cases down the line, then you
19 proceed on those cases. And so there's work that's being done
20 constantly. There's no efficiency to waiting here.

21 And in fact, we've already given Humana everything.
22 They have access to all of the defendants' productions. And so
23 they're sort of just sitting on everything we've given them in
24 discovery and we have nothing in return from them.

25 MR. WALDIN: If I could say something. That's not

1 accurate, Your Honor.

2 We've never received access to defendants' discovery.

3 JUDGE VANASKIE: All right.

4 MS. BRANCATO: The discovery in this case -- and I
5 think we explained this in our papers -- was available to all
6 plaintiffs. And Humana could have requested it and could have
7 participated in depositions and that kind of thing, which we've
8 explained.

9 MR. WALDIN: "Could have" is not the same as having
10 produced the documents to us.

11 JUDGE VANASKIE: And, Ms. Brancato, isn't this
12 typical of in class actions that, you know, until we know what
13 the class is, discovery doesn't proceed on an individual
14 plaintiff-by-plaintiff basis?

15 MS. BRANCATO: In my experience, Your Honor, where
16 there's a class and there are opt-outs, like, for example, in
17 the Generics MDL in the Eastern District of Pennsylvania right
18 now, discovery is proceeding as to the class and then also as
19 to the opt-outs at the same time.

20 JUDGE VANASKIE: Right. But we don't have opt-outs
21 here yet, do we?

22 MS. BRANCATO: I mean, I think that's up to Humana.
23 If they want to decide -- they should have to decide at this
24 point whether they are an opt-out or whether they want to
25 proceed as a member of the class.

1 MR. WALDIN: As we've said, Your Honor, we would
2 proceed as a member of the class if we were given some
3 assurances that we could do so.

4 We've just been not able to receive such assurances
5 that we would proceed as a member of the class.

6 JUDGE VANASKIE: I see.

7 So you're saying, Mr. Waldin, that if the American
8 Pipe tolling rule was confirmed as applicable here, so that if
9 a decision is made on the class certification motion, and the
10 decision is such that Humana falls outside the class or class
11 certification is denied, that Humana could then file its own
12 action?

13 MR. WALDIN: Correct. If Humana were to receive the
14 benefits of American Pipe tolling such that if the class were
15 denied or it fell outside or that it, B, offered an opportunity
16 to exercise the opt-out rights that any other class member had,
17 it would choose to proceed in that manner.

18 I would note though for the record that Humana
19 Pharmacy, which is a subsidiary of Humana, does have claims
20 which fall outside of the class claims, but most have not been
21 brought yet. We would just not want to prejudice those claims
22 as well.

23 JUDGE VANASKIE: So is the damage to the defendants
24 here, Ms. Brancato, limited to delaying the onset of discovery?

25 MS. BRANCATO: Your Honor, yes. I think that the

1 damage to defendants or the harm to defendants is the delay in
2 starting this case when it should move forward with all the
3 other cases.

4 JUDGE VANASKIE: And what discovery have you pursued
5 so far, the defendants?

6 MS. BRANCATO: From?

7 JUDGE VANASKIE: From the plaintiffs, from Humana.

8 MS. BRANCATO: We sent Humana requests for
9 production, which they refuse to respond to until the outcome
10 of this motion to stay.

11 MR. WALDIN: Well, we objected to them as untimely
12 under the Court's schedule. We didn't refuse to respond.

13 JUDGE VANASKIE: Okay.

14 MS. BRANCATO: And I understand that there's no
15 provision in the current court schedule for the Humana case
16 specifically. But that doesn't mean that we shouldn't come up
17 with a schedule for the Humana case or that the Court has ruled
18 that the Humana case shouldn't move forward right now.

19 JUDGE VANASKIE: Well, it just seems to me that in
20 the ordinary -- well, this is -- the combination of class
21 action and MDL, the whole purpose is to try to eliminate as
22 much duplication of effort as possible. Certainly in the class
23 action context that's true. And just because of the unique
24 circumstances, allowing this one action to proceed through
25 discovery while we're awaiting a ruling on a class

1 certification motion that won't be ripe until May of this year,
2 as I understand it, seems to defeat the purposes of having an
3 MDL and having a class action procedure. We're multiplying
4 litigation as opposed to streamlining litigation.

5 Is there anything else that, Mr. Waldin, you wanted
6 to say?

7 MR. WALDIN: No, Your Honor. I think we are in
8 agreement with that statement; that that's essentially our
9 position.

10 JUDGE VANASKIE: Yes.

11 Ms. Whiteley, did you want to say anything else?

12 MS. WHITELEY: No, Your Honor. Thank you.

13 JUDGE VANASKIE: All right. Ms. Brancato, anything
14 else?

15 MS. BRANCATO: Your Honor, the only thing -- the last
16 thing I would say is I think you laid out exactly what the
17 problem is here. Humana is trying to live in two different
18 lanes right now. And I think if they're going to pick the
19 opt-out lane, they need to do so and we need to move forward.
20 And if they're going to pick the class lane, then we will do
21 that.

22 But these two worlds that we're existing in right now
23 I think is causing the problem.

24 JUDGE VANASKIE: Well, I think I can put everybody in
25 the same world by granting a stay of the litigation that Humana

1 has brought.

2 You're right. They brought the action. It's
3 unusual, but not unheard of, for a plaintiff to seek a stay of
4 litigation. And I will issue a ruling that grants the Humana
5 motion to stay the litigation pending the outcome of the class
6 certification motion.

7 Once that decision is made, Humana is going to have
8 to fish or cut bait, as they say in my neck of the woods.

9 MR. WALDIN: Yeah.

10 JUDGE VANASKIE: And decide whether or not they're
11 going to opt out or be part of the class action. All right.

12 But I think in the interest of judicial economy and
13 the interests of the majority -- in this case the plaintiffs
14 and actually other defendants as well -- are best served if we
15 don't have two cases moving forward at the same time.

16 So, as I said, I'll issue a short order.

17 Thank you very much. This was helpful for me to
18 cement a decision in terms of what should be done here, and
19 we'll go from there, all right?

20 MS. BRANCATO: Thank you, Your Honor.

21 JUDGE VANASKIE: Thank you very much.

22 Thanks.

23 MR. WALDIN: Bye, Judge. Thank you.

24 JUDGE VANASKIE: Bye.

25 COURT REPORTER: Thank you, Your Honor.

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(Proceedings concluded at 2:17 p.m.)

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FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE
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I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s/John J. Kurz, RMR-CRR-CRC 1/7/2022
Court Reporter/Transcriber

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